

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JACQUES BEEKS)	
Claimant)	
)	
VS.)	
)	
PEGASUS CLEANING CORP.)	
Respondent)	Docket No. 1,044,772
)	
AND)	
)	
PENNSYLVANIA MFRS. ASSOCIATION)	
Insurance Carrier)	

ORDER

Claimant requested review of the May 8, 2012 Award by Administrative Law Judge Kenneth J. Hursh. The Board heard oral argument on August 22, 2012. The Workers Compensation's Director appointed Jeffrey E. King of Salina, Kansas, to serve as Board Member Pro Tem in place of Gary R. Terrill, who recused himself from this proceeding.

APPEARANCES

Mark E. Kolich of Lenexa, Kansas, appeared for the claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The claimant alleged injury to his right shoulder from lifting a trash can at work. During treatment it was discovered claimant suffered from a preexisting congenital defect that caused a shoulder condition described as a Charcot shoulder. Respondent then denied claimant had suffered accidental injury arising out of employment as any activity would inevitably have caused claimant's current shoulder condition.

The Administrative Law Judge (ALJ) determined the accident at work aggravated the preexisting right shoulder condition and was compensable. Dr. Daniel Zimmerman provided the only rating in the evidentiary record but the ALJ reduced the rating after concluding a portion of the shoulder rating was due to the preexisting shoulder condition. Consequently, the ALJ awarded claimant compensation for a 36% permanent partial disability to the right shoulder rather than the 52% rating provided by Dr. Zimmerman. The ALJ further determined that there was no evidence claimant required future medical treatment and further denied claimant's request that respondent pay for claimant's authorized treatment at Truman Medical Center because a bill was not produced.

Claimant requested review and argues the ALJ erred in reducing Dr. Zimmerman's rating as there was no proof claimant suffered a preexisting impairment. Claimant further argued he met his burden of proof to establish the need for ongoing medical treatment and the ALJ erred in denying his request that respondent pay for authorized medical treatment.

Respondent requests review of the following: (1) whether claimant's accidental injury arose out of and in the course of employment with respondent on December 29, 2008; (2) nature and extent of claimant's disability, if any; (3) whether respondent is liable for the medical expenses incurred at Truman Medical Center; and, (4) ongoing and future medical.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The ALJ's Award sets out findings of fact and conclusions of law that are detailed, accurate and supported by the record. It is not necessary to repeat those findings and conclusions herein. The Board adopts the ALJ's findings and conclusions as its own as if specifically set forth herein except as hereinafter noted.

Briefly stated, claimant performed janitorial duties for respondent. He was assigned by respondent to a customer to perform those activities. On December 29, 2008, claimant injured his right shoulder lifting a trash can. Claimant noted that the trash cans typically contained plastic, cardboard and paper but because construction was going on at the building someone had place cement and steel pipes in the trash can which claimant did not see. As he grabbed the trash can to lift it he heard a tearing sound in his right shoulder and experienced immediate pain.

Treatment was provided which ultimately revealed claimant had a syrinx which is fluid in the middle of the spinal cord. Dr. Craig Satterlee, a treating physician, testified that often the syrinx can cause the development of a Charcot shoulder which results in degeneration of the shoulder due to a lack of innervation of the shoulder. Dr. Satterlee

opined that 20-40% of individuals with a syrinx will develop a Charcot shoulder. Dr. Satterlee explained:

[T]wo theories for how that occurs, but what happens is in the center of the spinal cord, the parts of the spinal cord that go to pain and sensation are compressed and interrupted by the syrinx, and so the joint most commonly the shoulder, become insensate, that is it can't feel or sense where it is or what's going on on a neurologic level.

There's two theories how the joint becomes destroyed. One is called a neurotrauma where because it's insensate it has small injuries to it and the joint breaks down. The other is neurovascular where because of the change in what's called the symptomatic nervous system or the way the blood vessels act in the bone, the bone starts to reabsorb itself, and then with the reabsorption of the bone, the muscles tear off, the ligaments tear off, the joint becomes unstable and arthritic, and basically that's how a syrinx causes a neuropathic or so called Charcot joint. And as far as Charcot shoulders, the most common cause of the Charcot shoulder is a syrinx.¹

Dr. Satterlee opined that although claimant had the underlying neuropathic shoulder, the accident at work pulled more of his rotator cuff off and caused more fracturing of the bone. And Dr. Satterlee agreed the accident at work aggravated the underlying condition in claimant's right shoulder.

Dr. Daniel Zimmerman, examined and evaluated claimant on October 20, 2011, at the request of claimant's attorney. The doctor diagnosed claimant with a right shoulder rotator cuff tear, permanent aggravation of osteoarthritis affecting the right shoulder and right upper extremity brachial plexopathy all directly attributable to his work-related injury.

Initially, respondent argues claimant did not suffer a work-related injury arising out of and in the course of his employment because the preexisting condition in his shoulder would have inevitably lead to the condition he now experiences.

The law in effect on the date of this accident was well settled that an accidental injury is compensable even where the accident only serves to aggravate or accelerate an existing disease or intensifies the affliction.² The test is not whether the job-related activity or injury caused the condition but whether the job-related activity or injury aggravated or

¹ Satterlee Depo. at 7.

² *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984); *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978); *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976).

accelerated the condition.³ Both physicians testified that claimant's accident aggravated the preexisting condition in his shoulder. Moreover, there was also additional tearing of the rotator cuff. The Board affirms the ALJ's determination that claimant met his burden of proof to establish that he suffered accidental injury arising out of and in the course of his employment.

Claimant argues the ALJ erred in reducing Dr. Zimmerman's 52% rating for the shoulder. The ALJ determined that 25% of the doctor's rating was attributable to claimant's preexisting brachial plexus condition. But Dr. Zimmerman testified that claimant did not have any preexisting permanent impairment in his shoulder before his accidental injury because there was no medical documentation indicating he had a right shoulder condition at any time.

Based upon the *AMA Guides*⁴, Dr. Zimmerman rated claimant's right shoulder at 52%. Loss of range of motion was 21%, 18% for grating/crepitus in the shoulder, 25% for unilateral sensory or motor defects of the brachial plexus which all combine for a 52%. On cross examination, Dr. Zimmerman testified:

Q. But that condition itself, the brachial plexus injury, was that a consequence of this incident that occurred on December 29th, 2008 lifting the bags?

A. I think that brachial plexus rating is a consequence of lifting the bags because it would not have been rated at an earlier time in that there were no signs or symptoms associated with that condition that were present in this man's shoulder.⁵

Dr. Zimmerman provided the only rating contained in the evidentiary record.

The Workers Compensation Act provides that compensation awards should be reduced by the amount of preexisting functional impairment when the injured worker aggravates a preexisting condition. The Act reads:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of **functional** impairment determined to be preexisting.⁶ (Emphasis Added)

³ *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P.3d 1184, rev. denied 270 Kan. 898 (2001); *Woodward v. Beech Aircraft Corp.*, 24 Kan. App.2d 510, 949 P.2d 1149 (1997).

⁴ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *AMA Guides* unless otherwise noted.

⁵ Zimmerman Depo. at 18.

⁶ K.S.A. 44-501(c).

And functional impairment is defined by K.S.A. 44-510e(a) as follows:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.

The decision in *Hanson*⁷, is instructive as the facts are quite similar. In *Hanson*, the Court determined respondent had not met its burden to establish a preexisting functional impairment. The Court noted that K.S.A. 44-501(c) clearly distinguishes between a preexisting condition and a preexisting disability. The Court further noted there was no evidence of the amount of preexisting disability and there was some evidence that Hanson had no impairment because he had not sought treatment nor were his activities restricted after his initial injury to his knee.

In this case Dr. Zimmerman concluded claimant did not have any preexisting impairment. That opinion is uncontradicted and is corroborated by the evidentiary record. Consequently, the Board finds respondent did not meet its burden of proof to establish claimant suffered any preexisting impairment and the ALJ's Award is modified to reflect claimant is entitled to compensation for a 52% functional impairment to the right shoulder.

Claimant next argues the ALJ erred in failing to award future medical compensation. It is undisputed that surgery is contraindicated for claimant's Charcot shoulder because of the instability of the joint. But Dr. Satterlee did agree that claimant still required some treatment in the form of pain management. Likewise, Dr. Zimmerman agreed that pain management would be appropriate for claimant. The Board finds claimant met his burden of proof to establish the need for future medical treatment in the form of pain management to be provided by respondent. This treatment is ordered to be provided by respondent. Any additional medical treatment shall be upon application to the Director.

Finally, claimant argues respondent is liable for the medical expenses claimant incurred receiving authorized medical treatment at Truman Medical Center. The Board agrees. Dr. Satterlee referred claimant to a neurosurgeon and a shoulder specialist at Truman Medical Center. Such referral from an authorized physician would render the services rendered by Truman Medical Center authorized medical expenses as found by the ALJ. Consequently, respondent is ordered to pay the medical expenses incurred at Truman Medical Center upon presentation of itemized billings and subject to the medical fee schedule.

⁷ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184 (2000), *rev. denied* 270 Kan. 898 (2001).

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁸ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated May 8, 2012, is modified to reflect claimant is entitled to compensation for a 52% functional impairment to the right shoulder, claimant is awarded ongoing pain management medical treatment and respondent is liable for the medical expenses incurred at Truman Medical Center.

Claimant is entitled to 51 weeks of temporary total disability compensation at the rate of \$255.43 per week in the amount of \$13,026.93 followed by 90.48 weeks of permanent partial disability compensation, at the rate of \$255.43 per week, in the amount of \$23,111.31 for a 52% loss of use of the right shoulder, making a total award of \$36,138.24.

IT IS SO ORDERED.

Dated this 13th day of September, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

e: Mark E. Kolich, Attorney for Claimant, mek@kolichlaw.com
Douglas C. Hobbs, Attorney for Respondent and its Insurance Carrier,
dch@wsabe.com
Kenneth J. Hursh, Administrative Law Judge

⁸ K.S.A. 2010 Supp. 44-555c(k).